United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

75-7338

THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

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75 - 7338

LESLIE CANTY, JR.,

Plaintiff- Appellant

-against-

ELMER FLEMING et al

Defendants - Appellees

BRIEF + Appendix

LESLIE CANTY, JR.
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THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

75-7338

LESLIE CANTY, JR.

Plaintiff-Appellant

-against-

ELMER FLEMING et al

Defendants-Appellees

On appeal from the United States District Court for the Southern District of New York.

BRIEF OF PLAINTIFF-APPELLANT

This is an appeal by the Plaintiff-appellant Leslie Canty, Jr. from a order entered upon motion for judgment by the Honorable D.C. Bonsel in the United States District Court for the Southern District of New York on January 15, 1975; dismissing the complaint.

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ISSUES OF APPEAL

I.

Should this case be decided by any statue of limitations?

II.

What gives New York City Police Department the right to continue holding appellant's file in which he has requested?

I. Does this case involve issues of statue of limitatoins? Appellant answer is negative. We do not think there is a statue which relates directly to this action. We also think that it is invalid to apply the three year Statue of Limitation by saying this action was first to begin on March 10, 1971. We believe the concentration of involvement within this action should be centered around the transactions involved. We believe this action should be decided on the facts as well as laws involved.

Between March 5,1971 and August 3, 1972 appellant could not obtain any public employment because of the charges against him. Appellant was given a conditional discharge for attempting resisting arrest. He did not agree to such charges, but of not knowning which choice to decide because of the time involved. This was a period of time when other police officers had been wounded and killed in New York City and they were trying to get some kind of revenge. Appellant did not know of any other remedy.

which might have been available to him. The court informed appellant that he was not entitled to a jury trial.

The nature of this claim is not based upon the date in which appellant was dismissed from employment, but the procedures involving the dismissal and thereafter, even until the present time.

The District Attorney was involved within the nature of this action. Fleming and the district attorney were trying any way to make a case against appellant. On August 3, 1971 the district attorney informed appellant that he was being charged with harassment of an police officer and given a condition discharge for such offense. The charge was to be for one year. On August 3, 1972 appellant return to court to clear the charge. He also applied and requested for the return of his prints, photoprints and other material. Until the present time appellant has not received the matter in which was requested.

In Sullivan v. Murphy 478 F. 2d 936 (1973), the court held "When local statues give a police officer authority to arrest without a warrant, he must at the time of the arrest have sufficient reliable information to satisfy the probable cause requirement." See Beck v. Ohio, 379 U. S. 89, 85 S. Ct 222, 13, L. Ed. 2d 142 (1964); Henry v. United States, 361 U.S. 98, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1959); Pendergrast v. United

States, 135 U.S. App. D.C. 20 27-28, 416 F. 2d 776, 783 - 784, cert denied, 395 U.S. 926, 89 S.Ct. 1782, 23 L.Ed. 2d 243 (1959).

Chief Justice Burger, speaking for a unanimous Court, pointed out in Swann v. Board of Education, 402 U.S. 1, 15, 91 S.Ct. 1267, 28 L.Ed. 2d 554 (197):

Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy part wrongs is bound for breadth and flexibility are inherent in equitable remedies, and Swann expressly approved the equitable principal that "the nature of the violation determines the scope of the remedy. " 402 U.S. at 16, 91 S.Ct. at 1276.

Where two distinct grounds in support of a single cause of action are alleged, See Hurn v. Cursler, 289 U.S. 238, 246, 53 S.Ct. 586, 589, 77 L.Ed. 1148. In the instant case, once the plaintiff has proved a prima facie case for his federal claim, he need prove no other facts to show liability of the defendant under state law, and vice versa, as to this case. The allowance of pendent jurisdiction in these circumstances is in keeping with the policy of judicial economy, convenience and fairness to the litigants, U.M. W. v. Gibbs, 383 U.S. at 726, 86 S.Ct. at 1139, and well within the discretion of the trial court.

"In additional, while a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional right, a refusal on the part of the federal courts to intervene when no state proceeding is pending may plore the hapless plaintiff between the scylla of intentional flouting state law and the charybdis of forgoing when he believes to be constitutionally proctected activity in order to avoid becoming enmeshed in a criminal proceeding. Dombrowski v. Pfister, 380 U.S. 479, 490. See also, Boyle v. Landry, 401 U.S. 77, 80-81.

Looking at Steffel v. Thompson, 415 U.S. 452, the Court said, "the petitioner in this case has succeeded in objectively showing that the threat of imminent arrest, carroborated by the actual arrest of his companion has created an actual concrete controversy between himself and the agents of the State. He has therefore demonistrated "a genuine threat of influence of a disputed state criminal status" ceases when a "genuine threat" can be demonstrated will, I think, be exceeding rare. Comparing this with appellant, we notice that his aunt was also arrested for assault in which the charges were not true, See Parker v. State of New York, No. omitted. We also believe appellant had a right to resist being arrested when Fleming refuse to tell the nature for making such charges and arrest.

II. Do the New York City Police Department have a right to hold appellant prints and photoprints? Attention is vital to this question because the district court failed to make any type of response to this issue. We think the district court has the authority to solve this matter. Jurisdiction is conferred by 28 U.S.C. 1343, 2201, 2202 and original jurisdiction in the United States District of suits authorized by 42 U.S.C. 1981, 1983 and 1985.

This question is important to appellant because of the matter involved. In Steffel v. Thompson, 415 U.S. 452, the Court said "At the threshold We must consider whether petitioner presents "actual controversy," a requirement imposed by Article III of the Constitution and the expressed terms of the Federal Decloratory Judgement. Act. U.S.C 2201.

In Menard v. Saxbe, 498 F. 2d 1017 42 L.W. 2571, the Court said, "Although Menard cannot point with mathematical certainty to the exact consequences of his criminal file, we think it is clear that he has alleged a"cognizable legal injury." Finley v. Hampton, 154 U.S. App. D.C. 50, 54, 473 F.2d 180, 184 (1972). See also, Liard v. Tatum, 408 U.S. 1, 92 S.Ct. 2318, 33 L. Ed 2d 154 (1972). In Sullivan v. Murphy, 156 U.S. App. D.C. 28, 478 F.2d 938, cert denied, 414 U.S. 880, 94 S. Ct. 162, 38 L. Ed. 2d 125 (1973), this Court held that an action for expungement of arrest record is justifiable

on a careful review of the jurisprudence we concluded, see 478 F. 2d at 968. "The principal is well established, that a court may order the expungement arrest records, when the remedy is necessary and appropriate in order to preserve basic legal rights. This court like other courts hold that unlawful maintenance of records of arrest results in injurious and dangers that are "plain enough," 478 F. 2d at 790, and that this threat is not dissipated, or rendered insubstantial illusary, by the fact that the arrest was not followed by a prosecution. 478 F. 2d at 962 (foot note ommitted).

The judicial remedy of expungement is inherent and is not dependent on express statutory provisions and it exist to vindicate substantial rights provided by statue as well as by organic law. United States v. McLeod, 385 F. 2d 734 (5th Cir. 1967). Thus, for example, both this Court and the District Court for the District of Columbia have ordered the expungment of record of police action taken in flagrant violation of the Forth Amendment. In Sullivan v. Murphy, supra, we required expungement of records of mass arrest which established procedures broke down so that there was no showing of probably cause. See, Gormez v. Wilson, 323 F. Supp. 87 (D.D.C. 1971).

"We think it is plain that 28 U.S.C. 534 precludes the indentification division from maintaining in its criminal files as an arrest records encounter with the police that has been established not to constitute and arrest.

See 402 at 16, 91 S. Ct. at 1276. We take notice that a finding is clearly erroneous when, although there is evidence to support it, reviewing court on the entire evidence is left with definite and firm conviction that a mistake has been committed. Schley U.C. I. R.; C.A. N.Y. 1967, 375 F. 2d 747. Court of Appeals can in its own discretion notice plain errors on its own motion. Gilbert v. United States, C.A. cal 1962 307 F. 2d 332.

CONCLUSION

For the forgoing reasons, the District Court's judgement dismissing the complaint should be reversed and this action be remanded for trial and such other relief as may be appropriate.

Respectfully submitted,

Leslie Canty, Jr.

CIVIL DOCKET

UNITED STATES DISTRICT COURT

74 Civ. 2590

Jury demand date:

JUDGE BONSAL

D. C. Form No. 106 Rev.

TITLE OF CASES	ATTORNEYS
LESLIE CANTY, JR. vs. ELMER FLEMING, New York City Police Department, and STANLEY A. SLAWINSKI, Director, New York State Narcotic Addiction Control Commission, Defendants.	For plaintiff: LESLIE CANTY, JR. 301 West 150th Street New York, City 10039-Apt. 4-6 For defendant Louis J. Lefko Atty Gen., 2 World Trade Center, NYC 10047 (State Depts) 488-5168 Adrian P. Burke Corp. Counsel, Municipal Bldg. NYC 10007

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed X	Clerk		JUN 24 1974			
J.S. 6 mailed ✓	Marshal					
Basis of Action: Civil Rights $20,000	Docket fee					
	Witness fees					
Action arose at:	Depositions					

UNITED STATES COURT OF APPEALS FILED JUN 20 1975 ROBERT FUSARO CLERK SEC

DATE	PROCEEDINGS	Date Order Judgment N
Jun24-74	Filed complaint and issued summons.	
Jun.24-74	Filed Order that pltff. is permitted to proceed in forma pauperis, without prepayment of fees . Edelstein,C.J.	
Aug 2-74	Filed Cross answer and motion against dismissal.	
Aug. 6-74	Filed State Deft.ANSWER and Notice of Motion ret.9/9/74 for an order dismissing complaint for lack of jurisdiction and failure to state a claim.	LJL
ug. 6-74	Filed Memorandum of Law in support of Defts'motion to dismiss or ~~for judgment~~ on pleadings.	
Jul 19-74	Filed Summons with Marshal's Returns.Served: Elmer Fleming by Sgt.Collins 7/23/74, 7/3/74 NY State Drug Abuse Control Commission by Arthur A.Seif, 7/15/74	
Aug.12-74	Filed Deft. The City of NY's ANSWER.	APB
ug.19-74	Filed pltffs reply to State Deft's Answer and motion ret.9/9/74.	
ct.15-74	Filed MEMORANDUM #41311: Pltff's action ~~must~~ be dismissed because ~~the State has not consented to suits for damages unless the actions are~~ broutht in the New York court of claims. Accordingly, the complaint is dismissed as to the deft. the State of New York, & for the same reasons, the complaint is dismissed as to the City of New York Police Department, the only other deft. which has been served. So ordered. Bonsal,J.	
ct.23/74	Filed pltff.'s motion for reargument.	
ct.25-74	Filed affidavit of R.F.Burchill in opposition to pltff's motion to dismiss comp[illegible]nt.	
ec.6-75	Filed affidavit of pltff. Re: jurisdiction under 28 U.S.C.A. 2201.	
an.15-75	Filed Memorandum #41741: Pltff's applications are denied in all respects. So ordered. Bonsal,J.	
ay.22-75	Filed Memo-endorsed on pltff's application for leave to appeal in forma pauperis. Application is granted, this objection having been misfiled in the clerk's office, appellant given 30 days to perfect appeal. So ordered. Bonsal,J.	
ay.22-75	Filed pltff's notice of appeal to the USCA from decision & order dismissing the complaint on 10-16-74	

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By A.E. Thompson
Deputy Clerk